

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION (TOLEDO)

TINA BURRIS,)	CASE NO. 3:20-cv-01450
)	
Plaintiff,)	JUDGE JAMES R. KNEPP II
)	
v.)	
)	
ETHICON, INC., et al.,)	<u>BENCH BRIEF REGARDING THE</u>
)	<u>OPINIONS OF PLAINTIFF'S</u>
Defendants.)	<u>PROPOSED REBUTTAL WITNESS, DR.</u>
)	<u>JERRY BLAIVAS.</u>
)	

During trial on Tuesday, July 19, 2022, Plaintiff sought leave from this Court to bring Plaintiff's expert witness, Dr. Jerry Blaivas, as a rebuttal witness to rebut testimony provided by Defendant's expert witness Dr. Larry Sirls on what risks are considered "common knowledge" to pelvic floor surgeons. Plaintiff had identified Dr. Blaivas as a potential witness in her case in chief, but chose not to call Dr. Blaivas as a witness.

First, Dr. Blaivas is an inappropriate rebuttal witness on the issue of what is "commonly known" to pelvic floor surgeons because he did not disclose in his report *any* opinion about what is or is not "common knowledge among physicians who perform pelvic floor surgery." Dr. Blaivas's Report identified 15 categories of opinions on which he intends to offer expert testimony, and *none* of those opinions relate to the common knowledge of pelvic floor surgeons. *See* Report of Dr. Jerry Blaivas ("Blaivas Report") at p.3-4, attached as Exhibit A. This Court has routinely held during this trial that it will not permit expert witnesses to testify as to matters not identified in their report. Permitting Dr. Blaivas to do so, as a rebuttal witness, would therefore introduce unfair prejudice not only by giving Plaintiff the "last word" in terms of evidence, but also by exempting Dr. Blaivas from the rule that has applied to every other expert witness who has offered testimony in this case.

In addition, any testimony Dr. Blaivas intends to offer regarding his personal awareness of risks associated with pelvic mesh surgery should be excluded under Rule 403. The only relevant warnings issues in this case concern 1) Plaintiff's implanting surgeon, Dr. Brown's, knowledge, or 2) the "common knowledge" of pelvic floor surgeons, generally. Dr. Blaivas' personal knowledge is not relevant to either of these categories.

Second, it is inappropriate for Dr. Blaivas to testify as a rebuttal witness because the issue on which he proposes to testify—the "common knowledge" of pelvic floor physicians—has been a known issue since before the start of trial. This Court's Preliminary Jury Instructions, which were based on the parties' *joint submission*—instructed the jury that: "A product **is not defective due to lack of warning or inadequate warning** as a result of the failure of its manufacturer to warn about an open and obvious risk or a risk that is a **matter of common knowledge among physicians who perform pelvic floor surgery**." Plaintiff was therefore on notice that the issue on which they propose to offer Dr. Blaivas was an issue the jury will consider in this case. Plaintiff did not need to await Defendants' presentation of the evidence to rebut this known issue in the case.

Respectfully submitted,

/s/ Tariq M. Naeem

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CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2022, a copy of the foregoing was filed electronically.

Service of this filing will be made by operation of the Court's electronic filing system.

/s/ Erica M. James

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